



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107093/2019

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Held in Glasgow on 19 September 2019

Employment Judge L Wiseman

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Ms L Wheatley

**Claimant
In Person**

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Rradar (Scotland) Ltd

**Respondent
Represented by:
Mr R Bradley -
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided to refuse the claimant's application to amend the claim.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 26 May 2019.
 - 25 2. The respondent entered a response on 26 June 2019.
 3. A case management preliminary hearing took place on 26 July 2019 at which the Employment Judge noted that it appeared from the Agenda completed by the claimant that she wished to make a claim under the Equality Act. The Employment Judge ordered the claimant to provide her proposed amendment, and gave the respondent 14 days in which to provide any objection to the application.
 - 30 4. The claimant, by letter of the 7 August 2019, confirmed she wished to make an application to amend the claim to include complaints of harassment (contrary to section 26 of the Equality Act) and victimisation (contrary to
- E.T. Z4 (WR)**

section 27 of the Equality Act). The claimant also set out her position which was that although she had not ticked the box to indicate she wished to make a complaint of discrimination, she had set out a reference to this in the statement of claim.

- 5 5. The respondent, by email of 23 August, responded to the claimant's application to amend the claim and set out their objection to the application.
6. The hearing today was a preliminary hearing to determine the claimant's application to amend the claim form.
7. I heard submissions from the claimant; and from Mr Bradley, for the
10 respondent. I was also referred to a small number of documents produced by Mr Bradley.

Claimant's submissions

8. Ms Wheatley invited the tribunal to have regard to the written application for amendment which included an explanation why this had not been included in
15 the claim form. Ms Wheatley confirmed she had submitted her claim using the online facility and, having ticked the box for unfair dismissal, she had been unable to go back to tick a box for an Equality Act claim. Accordingly, Ms Wheatley had included a narrative in paragraph 5 of the statement of claim, referencing her Equality Act claims. Ms Wheatley submitted the claims had
20 already been intimated to the respondent in her grievance in January 2019, shortly before her dismissal. Ms Wheatley noted she had specifically mentioned the Equality Act in paragraph 8 of the statement of claim because it was the only way she could include that information on the form.
9. Ms Wheatley was surprised when this issue was raised at the case
25 management preliminary hearing on the 26 July. She had not understood that failing to tick the box would lead to this situation.
10. Ms Wheatley is a solicitor advocate of 20 years' experience, but not an
employment lawyer, although she has had some experience of dealing with employment cases for respondents. She has appeared in Courts and
30 Tribunals and has experience of drafting initial writs. Ms Wheatley considered

she tried to use this experience when formulating the statement of claim. However, the claim is personal to her and she cannot detach from it.

11. Ms Wheatley considered she had given fair notice to the respondent because the complaints which she wishes to have included have been raised with the respondent in her grievance. Ms Wheatley believed paragraph 5 of the statement of claim would give sufficient notice to the respondent of the complaints.
12. Ms Wheatley submitted it would be in the interests of justice to allow the amendment. There had been a minor difficulty in completing the claim form and the respondent already had fair notice of the complaints. Ms Wheatley considered she had done her best to state the claim in the claim form.
13. Ms Wheatley submitted she was a party litigant and it was not fair for the respondent to suggest a higher standard should apply to her because of her background. There would be no prejudice to the respondent in allowing the amendment.
14. Ms Wheatley concluded her submission by inviting the tribunal to allow the application to amend. However, if the application to amend was refused, Ms Wheatley noted the issues would proceed as protected disclosures.
15. Ms Wheatley, in response to Mr Bradley's submission, suggested that any issue of timebar regarding the new claims should be reserved to the full hearing. She believed there was a stateable case and that it would be in the interests of justice for it to be heard. Ms Wheatley did not accept that inclusion of these complaints would prolong the hearing.

Respondent's submissions

16. Mr Bradley submitted the application to amend should be refused and he invited the tribunal to have regard to the respondent's email of the 23 August and these submissions.
17. Mr Bradley noted that at the previous preliminary hearing the Employment Judge, in the Note dated 26 July 2019 and produced at page 31, at paragraph

2, stated *"It appeared from the claimants Agenda produced for this hearing that she wished to make a claim under the Equality Act. ...It did not seem to me that her claim, as currently pled, included a claim under the Equality Act 2010."* The absence of an Equality Act claim was re-enforced by the directions given by the Employment Judge and set out at paragraph 3. Mr Bradley submitted that it could be taken from the directions given (to specify the statutory basis of the amendment, to identify the protected characteristic relied upon, to say what the unlawful conduct was and when it took place) that none of the points specified in the directions had been included in the claim form.

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18. Mr Bradley noted the claimant made much of not having ticked a box, but submitted there was much more to this than not ticking a box, because up until the application to amend, there had not been a claim brought under the Equality Act.

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19. Mr Bradley referred to the case of **Selkent Bus Co Ltd v Moore 1996 ICR 836** where the Employment Appeal Tribunal (EAT) had said that whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The EAT then set out a number of factors which may be relevant to consider.

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20. Mr Bradley categorised the application to amend as seeking to introduce entirely new factual allegations which changed the basis of the claim. The claimant had referred to the amendment being a "correction to a minor difficulty with the claim form". Mr Bradley disagreed with this description, submitting it was wrong in circumstances where four new claims were being proposed.

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21. Mr Bradley submitted the claimant's description of the new claims as being "nothing new" was also wrong: in fact, it was quite the opposite because nowhere previously had the claimant given notice of those claims. The claims were not referred to within the claimant's grievance and it was submitted that

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the fact there was reference in the grievance to the factual background of the complaints was not fair notice of the claims the claimant now sought to make.

22. Mr Bradley invited the tribunal to have regard to the claim form, where the claimant had, at paragraphs 1 - 5 set out a factual narrative of the claim and, at paragraphs 6, 7 and 8 made specific reference to the statutory basis of the claims. Mr Bradley questioned why the claimant had not specified claims under the Equality Act. The claimant had referred to her experience of Court procedure and pleadings and it was submitted that she should have pled the claims she wished to bring.
23. Mr Bradley submitted the new claims were being brought out of time. The claimant had referred to alleged incidents occurring in October/November 2018. Mr Bradley reasoned that taking the 30 November 2018 as the latest date, the claimant had not initiated early conciliation until the 6 April. The claimant had not indicated any basis to the tribunal upon which it could consider extending time.
24. Mr Bradley further submitted that the balance of prejudice lay with the respondent in circumstances where they would be required to defend further complaints, which would extend the length of the hearing, require further preparation and incur additional costs. Furthermore, having regard to the claims the claimant wished to introduce, they had no reasonable prospect of success.
25. Mr Bradley invited the tribunal to balance all of the above points and conclude that the balance lay very strongly in favour of the respondent and in favour of refusing the application. If, however, the tribunal allowed the application, he sought a period of 14 days in which to respond to the new allegations.

Discussion and Decision

26. I firstly had regard to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules) and in particular to rule 29 which gives tribunals power to allow the parties to amend a claim or response.

27. I next had regard to the case of **Selkent Bus Co Ltd** (above) where the then President of the EAT gave some guidance as to how tribunals should approach applications for leave to amend. It was stated:

5 *'Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it... It is impossible and undesirable to attempt to list all of the relevant circumstances exhaustively, but the following are certainly relevant.*

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- *The nature of the amendment - applications to amend are of many different kinds ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations*

15 *which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.*

 - *The applicability of time limits - if a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the*

20 *tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions and*

 - *The timing and manner of the application - an application should not be refused solely because there has been a delay in making it. There*

25 *are no time limits laid down in the regulations of 1993 for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor.*

30 *It is relevant to consider why the application was not made earlier and why it is now being made ... Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in*

refusing or granting an amendment Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision. ”

28. I concluded, having had regard to this authority, that it would appropriate to consider the nature of the amendment. The claimant noted in her application that *“the amendment would allow for a correction to minor difficulty with the online completion of the ET1”*. I understood the claimant’s position to be that (i) it had not occurred to her that by not ticking the correct box for an Equality Act claim but narrating it elsewhere on the ET1, this would effectively exclude that element of the claim form from this action and (ii) she had narrated details of the Equality Act claim in the statement of claim and accordingly there would be no prejudice to the respondent to allow the amendment.
29. I considered each of these points in turn. The claim form invites claimants to “indicate the type of claim you are making by ticking one or more of the boxes below”. The claimant ticked the box indicating “I was unfairly dismissed”. The completion of this section of the claim form is indicative of the claims being made: it is not a situation whereby failure to tick the correct box renders a claim inadmissible. The fact the claimant did not tick a box indicating she wished to pursue a discrimination complaint is not determinative of the issue: it is but a factor to consider in the balance.
30. The claimant maintained she had narrated details of the discrimination claims in paragraphs 5 and 8 of the claim form. I could not accept that submission. The Statement of Claim attached to the claim form set out five paragraphs of factual details regarding the events said to have occurred. Paragraph 5 referred to the grievance raised by the claimant in January 2019, which detailed a number of concerns the claimant had with her line manager. The concerns included (i) a course of conduct of harassment and bullying by the line manager and veiled threats of disciplinary procedures which never materialised; (ii) persistent and wilful breaches of company policy; (iii) use of petty cash without reimbursing it; (iv) the line manager’s performance and (v) racist behaviour towards another employee.

31. I could not accept the claimant's suggestion that including a summary of the points raised in her grievance was sufficient to narrate the details of a discrimination claim.
32. I noted the claimant had, at paragraphs 6, 7 and 8 of the statement of claim, set out the statutory basis of her claim. She referred to section 103A Employment Rights Act and section 47B Employment Rights Act and section 43B(1)(b) Employment Rights Act. The claimant did not make reference to the Equality Act. The claimant did not, in her submission to the tribunal, offer any explanation why part of the claim had been specified and part had not. I considered the fact there was no reference to an Equality Act claim to be material.
33. The claimant is a litigant in person, but she is a legally qualified person with Court experience, and in particular with experience in drafting initial writs. I considered the claimant is a person who would understand the importance of making clear in the claim form, the claims to be pursued.
34. I concluded, in relation to the nature of the amendment sought by the claimant, that she was seeking to introduce a new cause of action not referred to or foreshadowed in the claim form. The claimant is seeking to introduce four new claims:-
- a claim of harassment (contrary to section 26 Equality Act) where the protected characteristic is sex;
 - a claim of victimisation (contrary to section 27 Equality Act) where the protected characteristic is race;
 - a claim of harassment (contrary to section 26 equality Act) where the protected characteristic is age and
 - a claim of victimisation (contrary to section 27 Equality Act) where the protected characteristic is age.
35. I next considered the applicability of time limits. Mr Bradley, having referred to the application to amend the claim, noted the claimant referenced incidents

occurring "in or around late October or November 2018". He suggested that taking the 30 November 2018 as the latest date for an incident, the claimant would have to have commenced early conciliation within the following three-month period. The claimant in fact commenced early conciliation on the 6 April, which was outwith the applicable time limit.

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36. I accepted Mr Bradley's submission that the new claims were potentially out of time. I say "potentially" because a tribunal has discretion to extend the time limit. I have no basis for determining whether any such argument would be successful. Accordingly, I restricted myself to putting into the balance the fact there appeared to be a timebar issue regarding the new claims.

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37. I next considered the fact the claimant made an application to amend the claim form within the time limit set out by the Employment Judge at the case management preliminary hearing. The claim form was presented on the 26 May 2019, and the application to amend was dated 7 August 2019.

38. I also had regard to the balance of prejudice. On the one hand, if the application is refused, the claimant will not be able to proceed with claims involving allegations of discrimination. The claimant will however be able to proceed with her whistleblowing claim and I noted the claimant's grievance (which detailed the claimant's concerns regarding her line manager) will be part of the evidence relating to this claim. On the other hand, if the application to amend is allowed, the respondent will be required to defend four additional claims. This will involve further preparation for the respondent and is likely to extend the length of the hearing.

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39. I, having considered all of the above points, decided to refuse the application to amend. I considered the claimant could have included the claims in the statement of claim, but did not do so. Furthermore, the claimant could provide no explanation why she had not specified a complaint (or complaints) under the Equality Act when she had specified complaints under the Employment Rights Act. I was satisfied the balance of prejudice lay with the respondent.

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40. The claim, as set out in the claim form (automatically unfair dismissal for making a protected disclosure - section 103A Employment Rights Act; and detriment for making a protected disclosure - section 47B Employment Rights Act) will now proceed to be listed for hearing.

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Employment Judge: Lucy Wiseman
Date of Judgment: 01 October 2019
Entered in register: 08 October 2019
and copied to parties

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